

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

AUG 27 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

FRANK MOON,

Appellant.

2 CA-CR 2008-0015

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of

the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20060454

Honorable Peter J. Cahill, Judge

AFFIRMED

Emily Danies

Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Frank Moon was convicted after a jury trial of possession of a dangerous drug and possession of drug paraphernalia. The trial court suspended the imposition of sentence and placed Moon on probation for three years.

¶2 Appellate counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). In compliance with *Clark*, counsel’s brief “contains a detailed factual and procedural history of the case, with citations to the record.” *Id.* ¶30. Avowing she has reviewed the trial court record and “[n]o arguable question of law has been found” to raise on appeal, counsel asks this court to search the record for fundamental error. *See id.* Moon has not filed a supplemental brief.

¶3 Although she has not squarely raised any issues, counsel states that “[c]ertain action taken by the trial court may provide the appearance of an arguable issue.” Specifically, counsel suggests the trial court may have abused its discretion when it precluded Moon’s statement, contained in a police report, that the jeans he was wearing when arrested did not belong to him. At trial, a police officer testified that, pursuant to a search of Moon incident to arrest, he had found a plastic bag of methamphetamine in the coin pocket of the jeans. During cross-examination of the officer, the state objected when Moon attempted to ask about the statement, arguing it was inadmissible hearsay. Moon argued it was not hearsay but a party admission, and in the alternative, the statement fell within an exception to the hearsay rule as an excited utterance. The court ruled that the

statement was neither a party admission nor an excited utterance and sustained the state's objection.

¶4 “Rule 801(d)(2)[, Ariz. R. Evid.,] provides that an admission by a party opponent is not hearsay and is therefore admissible if offered against the person who made it.” *State v. Bocharski*, 200 Ariz. 50, ¶ 37, 22 P.3d 43, 51 (2001). Because Moon was attempting to offer his own statement not as an admission but to exculpate himself, that statement did not qualify as a party admission.

¶5 For a statement to qualify as an excited utterance, there must be a startling event, and the words spoken must relate to and be spoken soon after the startling event. *State v. Cruz*, 218 Ariz. 149, ¶ 54, 181 P.3d 196, 208 (2008); Ariz. R. Evid. 803(2). Here, the trial court found that, even assuming Moon had been under stress as a result of having been stopped by police, his statement had not related to a startling event. We find no error in that conclusion. *See, e.g., State v. Bass*, 198 Ariz. 571, ¶ 23, 12 P.3d 796, 803 (2000) (automobile accident startling event but statements not relating to accident itself inadmissible); *State v. Anaya*, 165 Ariz. 535, 538, 799 P.2d 876, 879 (App. 1990) (intoxicated man brandishing high-powered rifles and stating, “I will get killed or kill somebody,” firing shots outside house, pointing rifle at his wife, and hitting her with butt of rifle were startling events).

¶6 Because the record contains sufficient evidence establishing the elements of the offenses of which Moon was convicted, because his placement on probation was proper

under A.R.S. §§ 13-901 and 13-902, and because our search of the record for fundamental, reversible error pursuant to *Anders* reveals none, we affirm Moon's convictions and sentences.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge